BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON K. ANDERSON	)	
Claimant	)	
	)	
VS.	)	
	)	
VICTORY JUNCTION RESTAURANT	)	
Respondent	)	Docket No. 1,015,122
	)	
AND	)	
	)	
KS. RESTAURANT & HOSPITALITY	)	
SELF-INSURERS FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the August 8, 2005 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on November 8, 2005.

APPEARANCES

Timothy M. Alvarez, of Kansas City, Kansas, appeared for the claimant. Jeffery R. Brewer, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that Dr. Bubb's bill in the sum of $536 is no longer in dispute and will be paid by respondent. The parties also stipulated that claimant sustained a 7 percent functional impairment as a result of her work-related accident.

ISSUES

The ALJ found that the claimant sustained a 50 percent work disability under K.S.A. 44-510e(a) based on a 50 percent wage loss and a 50 percent task loss.[1]

The respondent requests review of this Award asserting claimant is only entitled to a functional impairment as a result of her work-related injury. Respondent maintains claimant has returned to work and is earning comparable wages and thus under K.S.A. 44-510e(a) is not entitled to a work disability award. Alternatively, respondent argues the evidence suggests claimant is entitled to a 21 percent work disability based on a 30 percent task loss and a 12 percent wage loss. Accordingly, respondent asks the Board to modify the ALJ's Award downward to reflect either the 7 percent functional impairment or a 21 percent work disability.

Claimant argues that the ALJ's Award should be affirmed. In the alternative, claimant argues the Award should be increased to reflect a higher task and wage loss. Claimant maintains she is working 50 percent less than she was before her injury and that her task loss is somewhere between 90 -100 percent based upon an 8 hour work day as suggested by Dr. McDonald. When both these figures are averaged, claimant argues she is entitled to a 70-75 percent work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was injured during her employment with respondent as a waitress on November 18, 2003, when she fell down some stairs landing on her tailbone while going down to the basement of the restaurant to gather supplies. Claimant was sent to the Shawnee Mission Hospital where she complained of back and elbow pain.[2] X-rays showed soft tissue swelling overlying the olecranon process, suggesting olecranon bursitis.[3] She was then referred to Dr. Stephen Bubb for treatment for her elbow. Ultimately those complaints resolved and as of the regular hearing claimant was no longer complaining of any problems to her elbow.

Claimant was also referred to Dr. Douglas Burton, an orthopaedic surgeon, on January 6, 2004 for treatment to her lumbar spine and tailbone. At this time, claimant had limited range of motion in her lumbar spine and decreased forward flexion as well as

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[1] The ALJ did not make any finding with respect to claimant's permanent functional impairment.

[2] R.H. Trans. (Apr. 5, 2005) at 13.

[3] McDonald Depo., Cl. Ex. 3 at 3.

decreased extension of 10 degrees. Claimant had an MRI and was given injections as well as physical therapy. Claimant was also sent for a functional capacities evaluation (FCE). As a result of the FCE, claimant was given permanent restrictions of working no more than 4 hours with a lifting limit of 15-20 pounds.

Dr. Burton ordered an MRI and opined that claimant had coccydynia secondary to her work injury. Dr. Burton recommended that claimant attend a second round of therapy, and was given a 20 pound weight restriction along with a four hour work day. Claimant had some difficulty attending the therapy appointments and ultimately the balance of her treatment was discontinued.

Dr. Burton found claimant to be at maximum medical improvement (MMI) on May 18, 2004 and assigned a 5 percent whole person impairment. After reviewing Michael Dreiling's task list, he opined that based on her lifting restrictions and a four hour work day, claimant could still perform 7 out of 10 tasks she has performeed in the last 15 years, which leaves claimant with a 30 percent task loss. He also opined that based on claimant working in excess of four hours per day, she would not be able to continue to perform any of her previous or present work duties and thus she bears a 100 percent task loss.

At her lawyer's request, claimant was evaluated by Dr. James H. McDonald on October 12, 2004. Dr. McDonald concluded claimant suffered a lumbosacral injury which places her in DRE category II as well as cubital tunnel syndrome. Based upon the 4th edition of the AMA *Guides* he concluded claimant is entitled to a 5 percent whole person permanent impairment. In addition, she is entitled to a 4 percent whole person permanent impairment for her cubital tunnel syndrome.[4]

On November 11, 2004, Dr. McDonald wrote an addendum to his October 12, 2004 report. In this addendum certain work restrictions were imposed. Based on a four hour work day the restrictions included a 15 pound weight restriction and claimant was instructed to avoid repetitive lifting, frequent bending, stooping, repetitive gripping, or use of the upper extremity, using power tools or torquing devices with the upper extremity and avoid sustained or repetitive gripping of the left upper extremity.[5]

Dr. McDonald also indicated that he had the opportunity to review the vocational assessment prepared by Michael Dreiling and opined that of the ten tasks assessed, claimant retained the ability to perform just one of the tasks. Of the one task she can do, she can only do it up to 4 hours per day and no more. Thus, based upon an 8 hour working day, her task loss is 100 percent, but if the 4 hours per day restriction is honored, then her task loss is 90 percent.

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[4] *Id.*, Ex. 3 at 5-6.

[5] *Id.*, Ex. 4.

Claimant testified that she returned to work in January of 2004 and took it upon herself to make sure that she stays within her restrictions, not doing any more than her back will allow. In fact, it appears from the record that claimant took it upon herself to begin working 4 hours per day and when she relayed this information to both Dr. Burton and Dr. McDonald, both physicians seemed to adopt that limitation as an acceptable restriction.

Claimant contends she has suffered a wage loss as a result of her accident because she is only working 20 hours per week rather than her pre-injury 40 hours. However, her testimony at the regular hearing suggests that is not the case.

At the regular hearing claimant testified that she earns $2.90 per hour plus tips. While she does not report the amount of her tips to her employer, she apparently keeps track of those monies separately for purposes of her taxes. According to claimant, her post-injury tips are, on average $45 to $50 per day, totaling $185 -$200 per week.[6] That, when added to her hourly wage of $2.90 per hour totals $243 - $258 per week, a figure that is comparable to her pre-injury wage of $265.20 per week.

Following the Regular Hearing, claimant was deposed on the issue of her post-injury wages. During this deposition, she produced records of her tips and wages over a 14 week period in 2005. During this time claimant was working 5 days a week, 4 hours per day. Her gross wages, including tips, for this period were $3,179.07. When that sum is divided by 14 weeks, the average is $227.08, a figure that represents a 14 percent wage loss. Claimant testified that she had no similar documents for 2004, as she had filed her taxes and the documentation was destroyed.

Respondent's owner, Nancy Phillips, testified as to her process for reporting claimant's wages. According to her, she calculates the waitresses' wages based upon $2.90 an hour plus an arbitrary additional $3.00 per hour, which brings each waitress up to the federal minimum wage. Ms. Phillips admits she does not know precisely what claimant or any of the waitresses make while working in the restaurant. She merely estimates their wages, seemingly employing a "don't ask, don't tell" philosophy.

There is no dispute as to the compensability of claimant's accident. Rather, it is the nature and extent of her resulting disability and impairment, specifically her permanent partial general (work) disability under K.S.A. 44-510e(a) that is in dispute.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> . . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

[6] R.H. Trans. at 33-34.

> ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk* and *Copeland*.[7] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

As for the task loss component of the work disability formula, the ALJ concluded claimant had sustained a 50 percent task loss. The Board has reviewed the physicians' opinions and concludes, based upon the statute's language, that claimant's task loss is 100 percent. Both physicians testified that claimant was presently unable to perform 100 percent of her pre-injury tasks based upon an 8 hour day. Although she may now be performing nearly all of those tasks up to 4 hours per day, the statute requires the finder of fact to consider the tasks as performed before the injury and compare that to the claimant's post injury restrictions. Accordingly, the Board finds she has sustained a 100 percent task loss and the ALJ's Award is modified accordingly.

The second prong of the work disability formula is the claimant's post injury wage loss. In this instance, claimant was accommodated by her employer both in terms of hours worked each day and in limiting her lifting requirements. This 4 hour per day limitation is reasonable and perhaps necessary if claimant is working in a physically demanding job such as waitressing. But if claimant were in a light duty or sedentary job she could work a full 8 hour day. Accordingly, claimant should be looking for work that she can perform for a full work day that would pay her a comparable wage. The Board is not satisfied that claimant's present employment is "appropriate". While claimant is able to limit her work hours, that hourly limitation is not something that was specifically imposed by any of the

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[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

physicians as a permanent work restriction. Rather, that limitation was initially imposed during her course of active treatment. Then, she was released to return to work with no such restriction. In short, there is no limitation on how many hours a day she can work, only on how long she can perform certain tasks.

Claimant apparently continued to limit her work hours (with respondent's acquiescence) and when she was rated by the physicians, they seemed to adopt that limitation as understandable for the type of work she was doing. Nonetheless, the Board is not persuaded that claimant is incapable of working a full day if she were performing work less physically demanding than waitressing. The Board finds that claimant could, with some effort, find appropriate full time employment that would pay her at least $6.00 per hour. When a claimant does not exhibit a good faith effort to find appropriate employment, the Board is authorized to impute a wage when determining the extent of work disability. Under these facts, the Board finds it is appropriate to impute a wage for 40 hours per week. The Board further finds that claimant has the ability to earn at least $6.00 per hour in a job that she is capable of performing for a full 8 hours work day, for 5 days a week.

At the imputed rate of $6.00 per hour for a 40 hour week, claimant's post injury wage would be 90 percent of her preinjury wage. Thus, she would not qualify for a work disability under K.S.A. 44-510e(a) and her Award should be limited to her functional impairment, which is, pursuant to the parties' stipulation, 7 percent to the body as a whole.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 8, 2005, is modified as follows:

The claimant is entitled to 18.32 weeks of temporary total disability compensation at the rate of $176.81 per week or $3,239.16 followed by 28.82 weeks of permanent partial disability compensation at the rate of $176.81 per week or $5,095.66 for a 7 percent functional disability, making a total award of $8,334.82.

As of December 16, 2005 there would be due and owing to the claimant 18.32 weeks of temporary total disability compensation at the rate of $176.81 per week in the sum of $3,239.16 plus 28.82 weeks of permanent partial disability compensation at the rate of $176.81 per week in the sum of $5,095.66 for a total due and owing of $8,334.82, which is ordered paid in one lump sum less amounts previously paid.

In addition the respondent shall pay Dr. Bubb's $536 bill subject to the fee schedule.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENTING OPINION

I disagree that a post-injury wage should be imputed for purposes of the permanent partial general disability formula. I find that the claimant's present shortened workday is appropriate and, therefore, her actual post-injury wage should be utilized. Accordingly, I believe claimant's permanent partial disability benefits should not be limited to her functional impairment rating.

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BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director